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IN THE
Supreme Court of the United States

OCTOBER TERM, 1951.

No. 426

UNITED STATES OF AMERICA,
Appellant,

versus

CLARENCE E. HOOD, JR., ET AL.,
Appellees.

APPELLEES' PETITION FOR REHEARING.

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Appellees' respectfully petition the court to grant them a rehearing and state the following grounds:

I.

It would be extremely difficult, if not impossible, to try a defendant indicted under the statute as construed by the court, within the compass of constitutional requirements and conventional procedural practices. This is a result which this court has frequently stated it will avoid. One clear instance illustrating the extent to which the court will go in limiting

"the generality of words in order to save the constitutionality of an act" is furnished in the opinion of Mr. Justice Holmes in *United States v. Walter* 263 U. S. 15, 68 L. Ed., 137. There this court construed the words "any corporation in which the United States of America is a stockholder" as meaning a corporation in which the United States owns all of the stock. Until the filing of the opinion in this case, the court has felt constrained many times to constrict the meaning of the words of a statute; but no instance has been pointed out in which the court has been willing to "stretch" the words of a statute "to cover conduct which is not prohibited on the theory that congress would have done so had it thought about it".

The interdiction of the statute as construed by the opinion extends to "any appointive office or place under the United States, including any such office or place as might reasonably be expected to be established".

How will the government go about proving that the office forming the basis of the complaint might reasonably be expected to be established? How will the trial judge instruct the jury on the point? How will the defendant go about meeting the government's proof? Whose judgment will control as to whether the office was in contemplation and whose process of "expecting" is to furnish the criterion?

How does this court reach the conclusion that the office of Chairman of the County Ration Board in Amite County, Mississippi, was within the scope of the test "might reasonably be expected to be established"? (Cf. R. 8) Presumably its conviction on the subject resulted from the argument presented by the government at pages 23-4 of its brief.

Certainly the congressional act itself says nothing about such an office. Nor does any finding or proclamation of the president contain any such intimation. If the conclusion of the court has any basis, therefore, it arises from the statements of Messrs. DiSalle, Johnston and Wilson. But not one of the quoted statements tends towards the conclusion that County Ration Boards were in contemplation or that any system of rationing of consumer goods was having consideration. The nearest approach to such a point is furnished by the quotation (government brief, page 24) of Mr. Eric A. Johnston who, when asked if rationing would have to be imposed, is supposed to have replied, "That depends. We don't know yet. We may. I am not sure as yet." On the other hand, the government quotes Mr. Charles E. Wilson, the superior of Mr. Johnston, as saying that "Consumer rationing would not be necessary in the near future".

If that testimony were offered at a trial in support of the government's duty to prove the "*corpus delicti*", would it be contended that this was sufficient showing that the office might reasonably be expected

to be established? And how would the litigants produce their proof? Assuming that constitutional requirements would be met by conducting the trial under the beneficent aegis of the Federal Register, would the fact that a government official gave out a statement be of probative value or would the defendant have the right to subject the author of such a statement to cross examination? The practical difficulties of such a course would loom extremely large in consideration of the fact that not one of these three gentlemen is now connected with the government.

Surely it would not be contended that what those three officials said was vested with finality. No one would be in better position to give expert testimony on the subject than the president. Next to the president the secretary of state would probably know more than anyone else about the state of diplomatic relationships out of which war might or might not grow. Nobody has hazarded a prognosis that consumer rationing would be seriously considered in the absence of an all-out shooting war with a major power.

The opinion properly accepts the thesis that judges are not blind to the facts of political life and doubtless the same is true with respect to economic life. Those facts as they would be revealed to one peering into the warehouses of American manufacturers would reveal that they are groaning under an overload of consumer goods so great that rationing would logically be postponed for many months even if all-out war should begin. Would that be competent proof

to be placed before a jury called upon to determine whether a particular office might reasonably be expected to be established? Is a defendant to risk his liberty in the hands of twelve men from the ordinary walks of life on whom has been thrust the burden of viewing world-wide conditions as sought to be interpreted by experts in and out of the government? An affirmative answer to that question will bring about a consummation which is the fundamental dread of the citizens of this republic—a government of men and not of laws. Yet the picture of the problems which would result from the engrafting onto the statute of such a nebulous phrase is, we submit, not overdrawn.

Without doubt, the opinion as filed gives rise to a unique situation. While it speaks of "the peddling of the forbidden wares",—a noun defined by Webster as "manufactured goods of a specific kind . . . goods, commodities, merchandise,"—its essence springs from the fact that it recognizes as bases of criminal statutes, "dealing in futures" and such chimerical concepts as "expectations" of unnamed persons and as accepted by individual juries who may be engaged in trials. In this, it is without precedent in the decisions of this court as far as our research reveals.

In *United States v. Halseth*, 96 L. Ed., Adv. Sh. 173, this court felt that the offense could exist only if the lottery existed and was a thing of present actuality. In *Morissette v. United States*, 96 L. Ed., Adv. Sh. 180, it was considered important, not only that the

shell casings had a physical existence, but that they belonged to the government and that their taking constituted a conscious deprivation of property from the government. In cases under the Dyer Act, it is not possible to prove a crime without proving first that there was an automobile, that it had been stolen and that the transporter knew that it was stolen. A case under the Mann Act is not possible without proving the existence of a female of flesh and blood, organs and dimensions. An employee of the government can not be convicted of embezzling a pig from the government unless it is first proved that the government had a pig—and it is assumed that there must be a pig *in esse*, and not one which had been "authorized" and might reasonably be expected to be born.

The complex situation with which we are now dealing results from the enlargement of the words of the statute. If Brashier had been indicted for soliciting a political contribution in consideration of his promise to Harvey in obtaining the office of Postmaster at Liberty, Amite County, Mississippi, the court would be dealing with a situation for which precedents could be found. Not so here. The introduction of the new ingredient of expectation, unexpressed in the statute, gives birth to a situation with which, we submit, appellees can not deal within the framework of constitutional requirements of due process and of accepted criminal procedures. That result follows from the words the decision adds to the statute and is a result which, under the decision of Mr. Justice Holmes first mentioned above, ought to be avoided; and es-

pecially so if the court is to maintain an attitude consistent with its former holdings.

In *United States v. Cohen*, 255 U. S. 81, 65 L. Ed., 516, the court refus d to enforce a statute making it unlawful to charge "unjust or unreasonable" prices, approving and quoting the language of the lower court in sustaining a demurrer to the indictment:

> "Congress alone has power to define crimes against the United States. This power can not be delegated to the courts or to the juries of this country. . . .
>
> "'. . . the law is vague, indefinite, and uncertain and . . . fixes no immutable standard of guilt, but leaves such standard to the variant views of the different courts and juries which may be called on to enforce it . . .'"

Mr. Justice Holmes had, a few years before, set the pattern when, speaking for the court, he held the anti-trust laws of Kentucky unenforceable, sustaining the Harvester Company's contention that "the law as construed offers no standard of conduct that it is possible to know."—*International Harvester Company v. Kentucky*, 234 U. S. 216, 58 L. Ed. 1284. And, in *Connally v. General Construction Company* 269 U. S. 385, 70 L. Ed., 322, enforcement was denied an Oklahoma statute requiring a contractor to pay employees "not less than the current rate of per diem wages in the locality", holding that "the constitutional guaranty of due process can not be allowed to rest upon a support so equivocal" as the meaning of words not

"made definite by statutory or judicial definition" rather than "upon the probably varying impressions of juries . . .".

It is clear that the present statute impinges upon the right of a man to speak his mind. If a solicitor of political contributions has been incautious enough to obtain money from one whose eye is fixed on a possible job, he must live henceforth under the real handicap of being unable to express his convictions as to who is best suited to fill that particular office. Those whose eyes are open to reality know that this is inevitably true, regardless of how pure the motives of the solicitor may be.

In such a situation, therefore, he must not speak his mind when men are under consideration for an office. His mouth is closed and his freedom to speak is limited. It is not sufficient to say that he could have avoided that situation by refusing the contribution from the man whose gaze was fixed on a government job. The concurring opinion of Mr. Justice Jackson in *Thomas v. Collins, infra,* 323 U. S., 546-7, 89 L. Ed., 449, aptly points out that "it is not often in this country that we now meet with direct and candid efforts to stop speaking or publication as such. Modern inroads on these rights come from associating the speaking with some other factor which the state may regulate so as to bring the whole within official control".

The hazard that the statute offends against the First Amendment of the constitution is increased by the addition by the majority opinion to the words embraced within the statute itself which indubitably brings the statute close to the borderline of repugnance to the Fifth and Sixth Amendments. Can it be doubted that the statute, with the added words, appears as lacking in definiteness as the *State* statute condemned by this court in *Winters v. New York* 333 U. S. 507, 92 L. Ed., 840? That statute challenged the earnest consideration of this court over a period of two years during which the court called for three arguments of counsel.

II.

The opinion filed in the name of the majority on March 31st offends against the universally recognized rule of this court that it will "not depart from . . . the words and context" of the act. Cf. *Pierce v. United States*, 314 U. S. 306, 86 L. Ed., 226. The traditional course of treatment of such matters by congress requires that the words "an office which had been authorized by law and which, at the time of the sale, might reasonably be expected to be established" be not added to the words of the statute itself.

This statute belongs to the category of regulatory measures whose emphasis is "upon achievement of some social betterment rather than the punishment of crimes . . .", a quotation in the *Morissette* case from the decision of Chief Justice Taft in *United*

States v. Balint 258 U. S. 251, 66 L. Ed., 605. It belongs also definitely in the class of those offenses referred to in the *Morissette* case as those "for whose definition the courts have no guidance except the Act." It appears in the chapter on Bribery and Graft, with respect to which whole subject both the congress and the courts have dealt with becoming caution. The companion statutes—see e. g. 18 U. S. C. 201—explicitly limit the crimes therein defined "to any officer or employee or person acting for or on behalf of the United States . . . in any official function . . ."; and the courts have shown a disposition to circumscribe these statutes more closely by requiring that such agents must be acting within the scope of their official duties. *James v. Bowman* 190 U. S. 127, 47 L. Ed., 979; *Blunden v. United States* (Sixth Circuit) 169 F(2) 991.

Essentially the statute operates in the realm of politics and proscribes the wrongful combination of two activities which are not only innocent in themselves but positive goods,—solicitation of money for political parties and use of influence in connection with appointive public office. These relate to "the immunities of the individual" which should not be submitted to "impairment . . . on judicial initiative", *Morissette* case, *supra*.

Influence belongs to the concept of freedom of speech protected by the First Amendment, *Thornhill v. Alabama* 310 U. S. 88, 84 L. Ed., 1093, *Thomas v. Collins, Sheriff* 323 U. S. 516, 89 L. Ed., 430, *West*

Virginia Board of Education v. Barnett 319 U. S. 624, 87 L. Ed., 1628, and any construction of the statute should be avoided which will bring it remotely into conflict with that constitutional guaranty. And whenever it has entered this political field, congress has proceeded with caution, carefully defining and delimiting the restrictions it has sought to place upon free action.

In the statutes governing political contributions by government employees congress carefully phrased the statute, 18 U. S. C. 602, so as to protect one employee from coercive exactions from a superior and this court gave its approval only as to the statutes thus strictly construed, *ex parte Curtis* 106 U. S. 371, 27 L. Ed., 232. Congress denied outsiders the right to solicit funds from government employees only while they were on government premises, the justification being to prevent interference with work and, so limited, this court approved. *United States v. Thayer*, 209 U. S. 39, 52 L. Ed., 673.

Congress did not essay to enter this field of political influence as related to political contributions until 1926 and search reveals only a handful of prosecutions since enactment of this statute. Why should a field so long neglected suddenly assume such importance as would influence this court to attribute to congress so much zeal as to sustain the conclusion that congress had, "in order to strike at the root, made the scope of the statute wider than the immediate evil?"

The picture drawn by the majority opinion of the "unsuspecting influence merchant" does not tend to meet the argument advanced by appellees and lacks force because it is an oversimplification. Under our form of government, strong political parties are essential and they can not have strength without proper financing. Too often political funds are handled by bad men but it is highly desirable that good men be interested in this public service. It is extremely difficult to perform the function of raising money without incurring real liability to prosecution under this statute or some similar statute. This court has confessed to having its eyes open to the machinations of practical politics.

If so, the court knows that a great portion of money raised in any political campaign is contributed by those who desire favors. It is inevitable that those who raise money for political parties have influence with the members of the party who are elected to serve as public officers.

It is hardly conceivable that men would normally be crass enough to go to a prospective donor and say, "I understand that you want to be appointed to public office; if you will donate three hundred dollars to the party, I will recommend you for this office". On the other hand, it would be naive to assume that a donor would fail to let slip some sort of intimation that he would like to be remembered in event of success. The direct approach is not necessary to conviction under the statute, even if restricted in meaning.

Under the circumstances last outlined, no charge would be thought of as long as things ran smoothly. But, as the court knows, the vicissitudes of political life bring first one faction and then another to the ascendency and, at times, the exigencies of the situation are well served by resort to the criminal courts. This statute was born of such an exigency. The meager history furnished in the government's brief, supplemented by facts of public knowledge, reveal that this statute had its origin in the hope on the part of a group of politicians that the one party system in the South could be broken in the coming election, if factions of the party in power in two states could be eliminated by criminal prosecutions.

Since that time the statute and its companion have lain in a state of innocuous desuetude, indicating further that neither the demands of the people nor the attitude of congress, as reflected in the history of this statute and its treatment of the whole field of politics, warrant the application of a rule which would tend to make the scope of the statute wider than "the immediate evil."

Going back to the picture drawn by the court of the mythical character "entrapped by the dubieties of this statute," it can not be forgotten that one of the reasons for the survival and strengthening of liberty in this country has been that this court has been willing to champion the cause even of the most despised criminal, in seeing that he is informed of the nature of the charges against him and that no federal statute

shall be permitted to stand whose terms he, as an average man, can not understand by reading what is printed in the text of the statute.

III.

This decision is, we submit, at war with an unbroken line of decisions preceding it. Throughout its history, this court has adhered undeviatingly to the thesis that congressional acts will not be enlarged by interpretation to encompass a broader field of morals than is required by the words used by congress. That temptation has been placed before the court many times and has been uniformly rejected.

At the base of the expanding process exemplified by the opinion of the majority lies the statement: "It is no less corrupt to sell an office one may never be able to deliver than to sell one he can. . . . We find no basis for allowing a breach of warranty to be a defense to corruption".

Reading this, one is reminded of what Lord Bryce said of the Holy Roman Empire, that "its three distinguishing characteristics were that it was neither holy, nor Roman, nor an empire." There is not a word in this record to justify the thought that any of these appellees made any representation at all concerning the OPS jobs or hinted at a warranty that they could be delivered. The presumptions of innocence conventionally attending persons charged with crime would suggest that the defendants at least

speculated with their supposed victims that the jobs "might reasonably be expected to be established". Nor does the statute concern itself with false pretense. Every state deals with that adequately. The considerations which moved the court to its conclusion, therefore, are without substance either in law or in fact.

The caution with which congress has proceeded in this field demonstrates not only that it recognizes that it can not correct all deviations from the codes of morals and ethics, but that it is a field wherein are planted the very roots of the democratic process. It has never yet passed a statute making it illegal to place a wager on a federal election. Nor has it until now, as far as research reveals, sought to enter the realm of "dealing in futures".

Certainly the *Halseth* case, *supra* is the nearest to this one on the facts. Gambling was the evil aimed at by congress in the statute there under consideration. It could be argued with as much force as here that it was more destructive of morals to use the mails to enter new fields and make new converts and multiply temptations to gambling than it was to invite the public to become participants in games of chance already established. But this court did not feel constrained to depart from its established practice of ascribing to the words of congress only the meaning those words have to the average layman. Therefore, it confined the meaning of the word "lottery" to an "existing" lottery and specifically declined to enlarge the statute

to embrace lotteries which "might reasonably be expected to be established". The court was led to that conclusion, not by any attitude of the Post Office officials, but by its own decision rendered more than a half century ago, *France v. United States*, 164 U. S. 676, 41 L. Ed., 595.

Falsely pretending to be an officer of the Tennessee Valley Authority undoubtedly "discredits the processes of government". But this court was not tempted to repudiate the "fundamental concept of the common law that crimes must be defined with appropriate definiteness" or to depart from the words and context of the statute, even though the statute was one possessing the broad scope of false pretense statutes, *Pierce v. United States* 314 U. S. 306, 86 L. Ed., 226.

Faced with the contention that embezzlement of a national bank's funds by a receiver was fully as corrupt as a like embezzlement by one of its officers, this court refused to hold that such a receiver was an "agent" of such a bank under a statute punishing embezzlement, but, speaking through Mr. Justice Brandeis, stated, "Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive", *United States v. Weitzel*, 246 U. S. 533, 62 L. Ed., 872.

The sole authority cited as support for the conclusion of the majority does not approach the facts of

this case as do those before the same eminent Justice, Oliver Wendell Holmes, in another case cited in the minority opinion:

> "Although it is not likely that a criminal would carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear. When a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft simply because it may seem to us that a similar policy applies, or upon the speculation that if the legislature had thought of it, very likely broader words would have been used." *McBoyle v. United States* 282 U. S. 25, 75 L. Ed., 816.

The cases are legion along the same line and even a listing of them is not necessary. It is sufficient to say that the opinion filed in this case marks a definite breach with principles heretofore uniformly adhered to by this court, and neither the facts of this case nor the context of the statute nor its history justify such a breach.

We can but suggest that the philosophy of criminal law so lucidly expounded in the *Morissette* case leads inevitably to the conclusion that the majority opinion has the effect of permitting a crime to be constituted from something "less than the incriminating com-

ponents contemplated by the words used in the statute".

Wherefore, appellants respectfully pray that their petition for rehearing may be granted.

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ALLAN T. EDWARDS,
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I, the undersigned member of the bar of this Honorable Court and counsel for appellees, hereby certify that this petition for rehearing is presented in good faith and not for delay; and that three copies thereof have been served on appellant by mailing same to the Solicitor General of the United States on April ...., 1952.

....,
Counsel for Appellees.